

Internal Revenue Service  
**memorandum**

date: SEP 06 1991

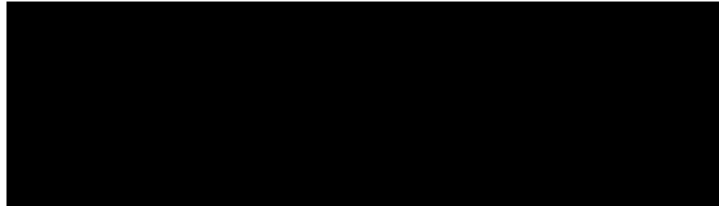
to: Director, Internal Revenue Service Center  
Kansas City, MO  
Attn: Entity Control

from: Technical Assistant  
Employee Benefits and Exempt Organizations

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subject: CC:EE:3 - TR-45-1083-91  
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of:



We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion reached by the Board that [REDACTED] is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

(Signed) Ronald L. Moore

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RONALD L. MOORE

Attachment:  
Copy of letter from Railroad Retirement Board

cc: Mr. Gary Kuper  
Internal Revenue Service  
200 South Hanley  
Clayton, MO 63105

08976

UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD  
844 RUSH STREET  
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

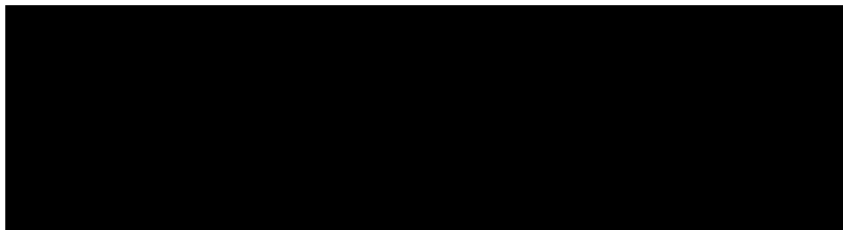
Assistant Chief Counsel  
(Employee Benefits and  
Exempt Organizations)  
Internal Revenue Service  
1111 Constitution Avenue., N.W.  
Washington, D.C. 20224

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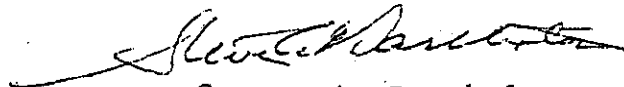
Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,



Steven A. Bartholow  
Deputy General Counsel

Enclosure

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

**MEMORANDUM**

JUN 20 1991

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]  
Employer Status

This is in reference to your Form G-215 of April 3, 1991, wherein you inquired as to the employer status of the [REDACTED].

The [REDACTED] has not previously been held to be an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Information about the [REDACTED] has been provided by Attorney [REDACTED] in letters dated [REDACTED], and [REDACTED].

The [REDACTED] was formed on [REDACTED] under the provisions of Minnesota Statutes Annotated (M.S.A.) Ch. 398A, entitled the "Regional Railroad Authorities Act" (M.S.A. §398A.01 Subd. 8). Section 398A.02 of that Act provides that:

"The purpose of the regional railroad authorities act is to provide a means whereby one or more municipalities, with state and federal aids as may be available, may provide for the preservation and improvement of local rail service for agriculture, industry, or passenger traffic and provide for the preservation of abandoned rail right-of-way for future transportation uses, when determined to be practicable and necessary for the public welfare, particularly in the case of abandonment of local rail lines." (M.S.A. §398A.02)

The [REDACTED]'s Certificate of Incorporation states that it is a political subdivision and unit of local government. According to [REDACTED], it is funded by appropriations from the Minnesota Legislature and taxes levied by the Authority pursuant to statute.

In Interstate Commerce Commission (ICC) Finance Docket No. [REDACTED] decided [REDACTED], the [REDACTED] filed a notice of

Director of Research and Employment Accounts

exemption under 49 CFR 1150.31<sup>1/</sup> to acquire the [REDACTED] belonging to the [REDACTED] 2/ between [REDACTED], Minnesota and [REDACTED], Minnesota, in [REDACTED] and [REDACTED], Minnesota. In addition, the [REDACTED] was to acquire incidental trackage rights over a portion of line owned by the [REDACTED] 3/. ICC Finance Docket No. [REDACTED] stated that the total mileage to be acquired by the [REDACTED] by purchase from [REDACTED] was [REDACTED] miles, together with [REDACTED] miles under lease and joint operating rights agreements with [REDACTED] and [REDACTED]. The ICC decision also stated that it was unclear whether the [REDACTED] would operate the line or whether an operator would be obtained

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1/ 49 CFR 1150.31 provides as follows:

"(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (See 1150.1, supra.) This exemption also includes:

"(1) Acquisition by a noncarrier of rail property that would be operated by a third party;

"(2) Operation by a new carrier of rail property acquired by a third party;

"(3) A change in operators on the line; and

"(4) Acquisition of incidental trackage rights.

Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at §1180.3(c).

"(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at §1180.2(d)(1) and (2), and the exemption from securities regulation at 49 CFR part 1175."

2/ The [REDACTED] (B.A. No. [REDACTED]) is an employer under the RRA and the RUIA, with service creditable from [REDACTED] to date.

3/ The [REDACTED] (B.A. No. [REDACTED]) is an employer under the RRA and the RUIA, with service creditable from [REDACTED] to date.

Director of Research and Employment Accounts

to provide service, and that a separate modified rail certificate or notice of exemption under 49 CFR 1150.31 would be required if service were going to be provided by an operator.

In his letter of [REDACTED], to Mr. George F. Traynere, former Director of Compensation and Certification, [REDACTED] stated that as of that time the [REDACTED] had acquired no rail line, had no employees, and had not filed for nor obtained an ICC exemption to operate as a rail carrier. Negotiations to acquire the rail line described in Finance Docket No. [REDACTED] were still ongoing.

In his letter of [REDACTED], to [REDACTED], [REDACTED] indicated that the [REDACTED] had acquired the lines described in Finance Docket No. [REDACTED]. [REDACTED] also stated that the [REDACTED] does not have employees and does not contemplate hiring employees. He stated that the [REDACTED] does not undertake railroad operations and does not intend to undertake railroad operations. [REDACTED] stated that other entities may operate over the track from time to time under trackage rights agreements or license rights from the [REDACTED] and that the [REDACTED] had not sought or obtained any further ICC exemptions.

In his letter of [REDACTED] to [REDACTED], [REDACTED] explained that the original filing with the ICC was based on the plan of the [REDACTED] at that time to operate both tourist excursion and freight service over the line, but that it was subsequently decided that the [REDACTED] would not operate trains at all and that neither the [REDACTED] nor its contract operators would provide freight service over the line.

[REDACTED] also stated that the [REDACTED] and [REDACTED] 4/ had operated a tourist excursion railroad over the line from approximately [REDACTED] through [REDACTED] and that commencing approximately [REDACTED], [REDACTED] 5/ was expected to operate a tourist excursion train over the line under contract with the [REDACTED].

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4/ It is unclear from [REDACTED]'s letter whether the [REDACTED] to which he refers is the same as the [REDACTED] referred to in Finance Docket No. [REDACTED].

5/ The employer status of [REDACTED] has not previously been considered.

Director of Research and Employment Accounts

Section 1 of the RRA defines "employer" to include:

"(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49." (45 U.S.C. §231(a)(1)(i)).

Section 1 of the RUIA contains the same definition.

In general, subchapter I of Chapter 105 of Title 49 of the United States Code applies to common carriers engaged in the transportation of passengers or freight, wholly or in part by railroad, in interstate commerce. However, section 10501(b) of Title 49 provides that:

"(b) The Commission does not have jurisdiction under subsection (a) of this section over --

(1) the transportation of passengers or property . . . entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle" (49 U.S.C. §10501(b)(1)).

In this case, [REDACTED] has stated (in his letter of [REDACTED] that the [REDACTED] originally filed a notice of exemption with the ICC in Finance Docket No. [REDACTED] based upon the [REDACTED]'s plan to operate both tourist excursion and freight service over the line involved. It was subsequently decided that the [REDACTED] would not operate trains at all and further that neither the [REDACTED] nor its contract operators would provide freight service over the line. Thus, despite the authorization which was granted in Finance Docket No. [REDACTED], the [REDACTED] has never begun to operate a railroad in interstate commerce. In the past, this office has not held an entity to be a rail carrier employer under the RRA and the RUIA unless it has actually commenced operating a railroad.<sup>6/</sup> It is therefore my opinion that the [REDACTED] is not a rail carrier employer based simply upon its having sought and obtained ICC authorization for the

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<sup>6/</sup> See, for example, Legal Opinion L-[REDACTED] which held that the [REDACTED] was not an employer under the RRA and the RUIA. I noted therein that [REDACTED] was merely a subsidy disbursing entity of state government which contracts with a rail operator, which at that particular time was Amtrak, to provide commuter service.

Director of Research and Employment Accounts

acquisition of the [REDACTED] line and certain incidental trackage rights, since it does not conduct and has not conducted rail operations over that line.

The question then becomes whether the operation of tourist excursion railroad service over the [REDACTED] line by two separate companies, pursuant to their contracts with the [REDACTED], have made the [REDACTED] an employer under the RRA and the RUIA. Prior opinions of this office have held that a company which operates within one state a tourist or excursion railroad solely for recreational and amusement purposes and which is not subject to Part I of the Interstate Commerce Act is not an employer under the RRA and the RUIA.<sup>7/</sup>

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<sup>7/</sup> See, for example, Legal Opinion L-[REDACTED], which addressed the employer status of the [REDACTED]

[REDACTED] That Association was a non-profit, charitable organization which operated an historic steam railroad primarily on weekends entirely within the State of Ohio, carrying passengers only (and no freight) for amusement and recreational purposes. It was held not to be a rail carrier employer because it was not engaged in interstate commerce and thus was not subject to part I of the Interstate Commerce Act.

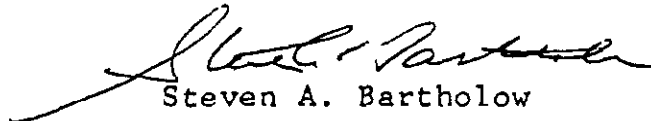
By contrast, see Legal Opinion L-[REDACTED]. That opinion discussed the employer status of the [REDACTED], which, beginning in [REDACTED], operated a seasonal passenger and tour railroad service within the [REDACTED]. On [REDACTED], the [REDACTED] began a through ticket service with Amtrak for passengers carried by the [REDACTED] between specified points. In Finance Docket No. [REDACTED], the ICC exercised its jurisdictional authority over the operations of the [REDACTED] solely because of the through ticket arrangement, stating in its decision that it has jurisdictional authority over a railroad lying wholly within one state if the railroad participates in the movement of passengers from one state to another under common arrangements with connecting carriers. L-[REDACTED] held that [REDACTED] became an employer under the RRA and the RUIA for the limited period of [REDACTED] until [REDACTED], when the through ticket arrangement ended.

Director of Research and Employment Accounts

In this case, the ICC explicitly stated in its decision in Finance Docket No. [REDACTED] that a separate modified rail certificate or notice of exemption under 49 CFR 1150.31 would be required if service (presumably service as a common carrier by rail) was going to be provided by an operator. [REDACTED] indicated in his letter of [REDACTED], that there was no subsequent Finance Docket because it had been decided that neither the [REDACTED] nor its contract operators would operate freight service. The description of the rail line in Finance Docket No. [REDACTED] indicates that it lies entirely within the State of Minnesota. The operation of pure excursion railroad service over that line (with no through ticket arrangements) would not subject the operator to the jurisdiction of the ICC pursuant to the express provisions of 49 U.S.C. §10501(b) quoted earlier in this discussion. It therefore must be concluded that the [REDACTED] did not become a rail carrier employer by virtue of its agreements with the [REDACTED] and the [REDACTED] for the operation by those companies of a tourist excursion railroad over the [REDACTED] s line.

For the reasons discussed above, it is my opinion that the [REDACTED] is not an employer under the RRA and the RUIA. The status of the [REDACTED] would, of course, need to be re-examined if it began to operate trains at sometime in the future.

An appropriate Form G-215, giving effect to the foregoing, is attached.

  
Steven A. Bartholow

Attachment